

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Stockton, CA)

DANA CORPORATION

Employer

and

Case 32-RC-5252

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
LOCAL NO. 162, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Dana Corporation, is engaged in the manufacture of truck body frames in Stockton, California, where it employs approximately 194 employees. The Petitioner, Sheet Metal Workers' International Association, Local No. 162, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent, as amended at the hearing, a unit consisting of production specialists, production technicians, electrocoat technicians, quality control technicians and material handlers, including forklift operators and maintenance technicians. A hearing officer of the Board held a hearing and both parties participated in the hearing.¹

¹ The deadline for the filing of briefs in this matter was May 24, 2004. The Employer timely filed a brief. The Union's brief was postmarked May 24, 2004 and was received in this office on May 25, 2004. The brief was thus untimely filed, and I have not relied on the arguments raised in that brief. I note, however, that even if the Union's brief had been timely filed and had been considered by me, it would not have changed my decision in this case.

As evidenced at the hearing and in the Employer's brief, the parties disagree on the following two issues: (1) whether "temp-for-hire" employees should be included in the unit and (2) whether the two quality control specialists, Sue Shackleford and Joubert Salamanca, should be excluded from the unit because they are statutory supervisors.

The Employer contends that the unit should include the temp-for hire employees and the quality control specialists. The Petitioner seeks to exclude the temp-for hire employees and the quality control specialists.

I have considered the evidence and the arguments presented by the parties on both of the issues. As discussed below, I have concluded that the temp-for-hire employees share such a strong community of interest with the employees in the petitioned for unit so as to mandate their inclusion. I also find that the quality control specialists should be included in the unit, because the Petitioner did not present any evidence or arguments to establish that the quality control specialists are statutory supervisors. Accordingly, I have directed an election in a unit that consists of approximately 194 employees.

To provide a context for my discussion of those issues, I will first provide an overview of the Employer's operations. Then I will present in detail the facts and reasoning that support each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

At its Stockton, California facility, the Employer manufactures Toyota truck frames for New United Motor Manufacturing in Fremont, CA. The plant operates with two production shifts and three maintenance shifts. All production technicians work on an assembly line where metal pieces are welded at various stations. A frame is

produced by the end of the line that is then painted and staged for shipping. At various points along the assembly line, quality specialists inspect the frames.

Tim Reed is the plant manager. Approximately 10 individuals who manage various aspects of the facility report directly to him. Reporting directly to these managers are production, maintenance and quality coordinators.

II. THE TEMP-FOR-HIRE EMPLOYEE ISSUE²

Facts

Since 1998, the Employer has hired all of its production employees through what is called a temp-for-hire process. The Employer contracts for these individuals with Volt, a temporary employment agency. Approximately once each calendar quarter, the Employer advises Volt that production line recruits are needed for a new training class. The only qualifications for the recruits are that they be at least 18 years of age and, if possible, have previous manufacturing experience. If Volt does not already have people in their system that meet these criteria, it advertises for them and then pre-screens them. This includes immigration, drug and background checks. Volt then forwards candidates' names to the Employer who reviews the applications and selects individuals for interview. The Employer uses a panel for the interviews, which usually consists of the human resources manager, a coordinator and a product technician. Once the individuals pass the interview stage, the Employer notifies Volt that it wants certain individuals to participate in the temp-for-hire program.

Each temp-for-hire class consists of 20 to 22 individuals. Initial training consists of 40 hours over a two-week period. During that time, candidates complete a standard

employment application and receive training in the production process and welding. The training is conducted by a quality control specialist, two production coordinators and a continuous improvement coordinator. At the end of the training, the Employer administers a written test and a hands-on welding test. If an individual does not pass the test, the human resources manager and one of the trainers would decide whether to allow the person to attempt the program again in the future or to advise Volt that the person was rejected.

Once the candidates pass the two-week training class, they become temp-for-hire employees and are assigned to a position on the production line. There are four teams of product techs and a material handling team. Team members, including the temp-for hire employees, work in close proximity to each other on the assembly line. Team members are regularly rotated among the different types of work stations so that they all learn each position and so that they avoid repetitive stress syndrome. Temp-for-hires work in all of the various production jobs on both production shifts. Every 30 days the temp-for-hire employees are evaluated by 3 or 4 of their peers with a summary evaluation by a production coordinator. If, at the end of six months, a temp-for -hire employee receives a satisfactory review, the temp-for-hire employee becomes a regular employee and then serves an additional 90-day probationary period. Currently, there are 22 temp-for-hire production employees.

The Employer also prefers to hire its maintenance employees through a temp-for-hire program. However, depending on need, the Employer will at times directly hire these individuals through advertisements or job bidding procedures. Although the

² The Employer occasionally uses temporary employees to fill in for employees who are using sick leave or who are on vacation. The parties stipulated that these infrequently used temporary employees should

Employer sometimes uses Volt Agency, it typically uses Maintenance Match, Staffing Network and Bayspan for its temp-for-hire maintenance employees. Of the current 16 maintenance technicians, 6 are temp-for-hire employees. Maintenance temp-for-hire employees perform the same work as the regular maintenance technicians and work on all maintenance shifts. This work includes preventive maintenance on machinery, repair breakdowns, electrical tasks, and service of forklifts and other machinery. Their training period is 90 days which consists mostly of on the job training with a mentor.

Volt and the other temporary agencies have no supervisors on site and no daily interaction with any of the employees. The Employer makes all decisions regarding whether an employee will be accepted into the temp-for-hire program and whether a temp-for-hire employee will be employed by the Employer. It also decides whether temp-for-hire employees should be disciplined or terminated, and the Employer's supervisors or managers impose the discipline and or terminate the temp-for-hire employees.

The Employer also sets the wage rates for all temp-for-hire employees: production employees earn approximately \$10 per hour and maintenance employees earn \$17 per hour. (Regular production employees earn approximately \$12.50 per hour and regular maintenance technicians earn \$19.50). Temp-for-hire employees fill out time sheets that are sent to Volt by the Employer and Volt cuts the paychecks for the employees. Volt sends the paychecks to the Employer who distributes them on the same day that regular employees are paid. The Employer pays Volt a percentage markup on a monthly basis for each employee. This markup, approximately 36% of the individual's hourly wage rate, is for other employment related costs such as worker's

not be included in the unit, and I find that they should be excluded from the unit.

compensation, state disability and unemployment insurance, social security, and the agency's profit. Temp-for-hire employees are not eligible for any general wage increases or benefits granted by the Employer until they become regular employees.

All employees wear uniforms provided by the Employer. Regular employees have a company emblem along with their name on the uniform; temp-for-hire employees do not have the company emblem, only their name. The Employer also provides the temp-for-hire employees with: safety shoes; eyewear; and proxy cards, which give them access through the plant gate. The temp-for-hire employees are invited to participate in plant picnics, safety lunches and the annual holiday party, and they are also required to attend regularly held plant employee meetings. They also use the same cafeteria, locker room and parking lot as regular employees. When a temp-for-hire employee suffers an on the job injury, the Employer brings the employee to the same medical clinic it uses for regular employees. The Employer also maintains the same drug testing criteria, procedure and discipline for regular and temp-for-hire employees. Temp-for-hire employees work the same hours, are subject to the same plant rules and are required to work overtime under the same conditions as regular employees. The temp-for-hire employees receive holiday pay and shift premium pay as do regular employees.

Unlike regular employees, temp-for-hire employees are not eligible for the Employer's medical insurance, pension or gain share programs. They are entitled to family and medical leave and bereavement leave through Volt. Volt is also responsible for their worker's comp and any health insurance benefits that might be available. Temp-for-hire employees do not earn seniority or pension credit for the three to six

month training period. Once temp-for-hires become regular employees, they must serve another 3-month probationary period before they become eligible for health benefits. After an additional 3 months, they begin accruing regular vacation benefits. The Employer has a peer review panel which allows employees to grieve unfair treatment or discipline. This is not available to temp-for-hire employees.

Analysis

As noted above, in this case, the Petitioner seeks a unit of the Employer's regular employees only and does not want the temp-for-hire temporary employees included in the unit. In such situations, the Board considers whether the community of interest shared between the temporary employees and the regular employees is so strong that the inclusion of the temporary employees into the unit is required. *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). The facts in this case are very similar to those in *Outokumpu Copper*, and I therefore find that the temp-for-hire production and maintenance employees share such a strong community of interest with the Employer's regular production and maintenance employees that their inclusion in the unit is required. As in *Outokumpu Copper*, the temp-for-hire employees work side by side with the regular production and maintenance employees; perform the same work; and work in all production and maintenance positions, on all shifts, in the same plant areas as the regular employees. Moreover, the Employer controls, directly or indirectly, nearly all terms and conditions of employment of the temp-for-hire employees, including their wages and work schedules. The temp-for-hire employees are supervised solely by the Employer's supervisors and managers, and it is they who select which applicants will be included in the temp-for-hire program; impose discipline, including discharge, on the

temp-for-hire employees; and give the temp-for-hire employees their work assignments.³ Moreover, the temp-for-hire employees wear Employer provided uniforms, attend monthly plant meetings and are eligible to participate in plant picnics, safety lunches and parties. They use the same cafeteria, locker room and parking area as unit employees. Significantly, as in *Outokumpu Copper*, other than some maintenance employees, the Employer's sole source of new employees is the pool of temp-for-hire employees.

Although Volt and the other agencies pay some benefits for the temp-for-hires, they are basically reimbursed by the Employer through the mark-up fee paid for each employee. The temp-for-hire employees do not receive medical, pension or vacation benefits from the Employer ; however, as in *Outokumpu Copper*, the Employer's regular employees are also not eligible for these benefits until they complete their probationary period. I also note that in *Outokumpu Copper* Board found that the temporary employees' differing wage rates, their ineligibility for benefits and seniority and their coverage under differing attendance policies was insufficient to warrant their exclusion from the bargaining unit. As the facts in this case are very similar to those in *Outokumpu Copper*, I conclude that the community of interest between the temp-for-hire employees and the Employer's regular employees is so strong that the temp-for-hire employees must be included in the unit. *Id.*⁴

³ The Employer directs Volt to limit applicants to those who are at least 18 years old and who, preferably, have manufacturing experience. Volt is also expected to investigate the applicant's immigration status.

⁴ I also note that the Petitioner's failure to name the supplier employers does not affect the issue of whether the two groups of employees share a community of interest. Rather, this failure to include the supplier employers relates only to the extent of the Employer's bargaining obligation if the Petitioner is certified. See *Professional Facilities Management*, 332 NLRB 345 (2000) and *M.B. Sturgis*, 331 NLRB 1298 (2000). Moreover, because the Petitioner has not named the supplier employers in the petition, I need not decide the joint employer status of the Employer and the supplier employers. *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001).

III. SUPERVISORY STATUS ISSUE

At the hearing, Petitioner's attorney took the position that the two quality control specialists should be excluded from the unit on the basis that they are statutory supervisors. However, Petitioner presented no record evidence, conclusionary assertions or arguments that would support this claim. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861 (2001); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tucson Gas and Electric Co.*, 241 NLRB 181 (1979). In this case, Petitioner has not met its burden of establishing that these individuals possess or exercise any of the supervisory indicia enumerated in Section 2(11) of the Act. Under these circumstances, I shall direct an election including the quality control specialists in the bargaining unit.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. I find that the Petitioner is a labor organization with the meaning of the Act.⁵

4. Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of the certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production specialists, production technicians, electrocoat technicians, quality control technicians, quality control specialists, maintenance technicians, material handlers, including forklift operators, temp-for-hire production technicians and temp-for-hire maintenance technicians employed by the Employer at its Stockton, California facility; excluding other temporary employees, office clerical employees, guards, and supervisors as defined in the Act.

V. DIRECTION OF ELECTION⁶

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Sheet Metal Workers' International Association, Local No. 162, AFL-CIO. The date, time, and place

⁵ For this finding, I take administrative notice of *Sheet Metal Workers' International Association Local Union No. 162 (Dwight Lang's Enterprises, Inc.)*, 314 NLRB 923 (1994).

⁶ I have concluded that the unit in this case is broader than that originally sought by the Petitioner. During the hearing, the Petitioner took the position that it is willing to represent employees in other than the petitioned for unit. In these circumstances, the Direction of Election is conditioned upon the Region determining that the Petitioner has an adequate showing of interest in the broader unit found to be appropriate in this case. To the extent that Petitioner does not have a sufficient showing of interest for the unit it is seeking, Petitioner will be directed to submit to the Regional Office an adequate showing of interest for the unit within 14 days from the date that it is notified of the insufficiency of its showing of interest. See Casehandling Manual (Part 2), Representational Proceedings, Sec. 11031.2. If the Petitioner fails to submit the required additional showing of interest, or its withdrawal of the petition, within the time provided, the petition will be dismissed.

of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election

should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before June 3, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notice of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on June 10, 2004. The request may **not** be filed by facsimile.

DATED AT Oakland, California this 27th day of May 2004.

Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

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460-5067-7050
737-2850-9200-0000